

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN E. FORTNER)	
Claimant)	
VS.)	
)	Docket No. 195,470
HOME & CABINET DESIGNS, INC.)	
Respondent)	
AND)	
)	
INSURANCE COMPANY OF NORTH AMERICA and)	
COMMERCIAL UNION INSURANCE COMPANY)	
Insurance Carriers)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Respondent and its insurance carrier, Insurance Company of North America, appeal from the preliminary hearing Order dated August 26, 1997, and the preliminary hearing Order Nunc Pro Tunc dated August 29, 1997, entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The respondent and its insurance carrier, Insurance Company of North America (INA) stated the issues for Appeals Board review as follows:

- "1. The compensability of claim as arising out of and in the course of claimant's employment with respondent, and whether certain defenses apply.

- “2. Whether the Administrative Law Judge exceeded her jurisdiction in granting the relief requested or conducting the conference call hearing. K.S.A. § 44-551(b)(2)(A)
- “3. On December 12, 1996, a Hearing was held wherein claimants request for additional medical was at issue. No formal Preliminary Hearing was held, but an Order was issued authorizing Dr. Mills for treatment and reserving issues as to the liability for the medical.
- “4. Subsequently, claimant counsel scheduled a conference call on August 13, 1997 among the parties when the order of August 26, 1997 was issued without a proper hearing to address compensability issues and medical previously submitted.
- “5. The Orders of August 26, 1997 and August 29, 1997 should be reversed since no formal Preliminary Hearing was conducted, no notice given, wherein the issues would be addressed and testimony taken of the claimant.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the Division of Workers Compensation's case file and considering the briefs of the parties, the Appeals Board finds as follows:

The first issue the Appeals Board will address is whether the Administrative Law Judge exceeded her jurisdiction when she entered a preliminary hearing Order without having a transcript made of the proceedings.

Claimant sent a letter on November 26, 1996, to respondent of his intent to file an Application For Preliminary Hearing pursuant to K.S.A. 44-534(a), as amended, if respondent did not authorize medical treatment for claimant's injuries by Philip R. Mills, M.D. Claimant followed the letter of intent by filing an Application for Preliminary Hearing with the Division of Workers Compensation on December 6, 1996.

A preliminary hearing was held in the matter on December 12, 1996, but a transcript of the proceedings was not made. Respondent's insurance carrier, INA, indicates, in its brief, that no actual hearing was conducted because the attorney for Commercial Union Insurance Company was ill and unable to attend the preliminary hearing. However, the Administrative Law Judge, in an order dated December 12, 1996, found claimant to be in need of medical treatment and authorized Dr. Mills to provide such treatment. The Administrative Law Judge also took the issue of liability for Dr. Mills' medical treatment under advisement pending a report from Dr. Mills regarding the causation of claimant's current symptoms and an opinion regarding maximum medical improvement. INA was ordered to pay the appearance fee of the court reporter. No appeal was taken from that order.

The Administrative Law Judge's file contains a letter dated May 20, 1997, from Dr. Mills that generally states that the claimant's back is causally related to his work injury and the claimant will occasionally have flare-ups. After receipt of Dr. Mills' letter dated May 20, 1997, the Administrative Law Judge did not enter an order designating which insurance carrier was liable to pay claimant's medical treatment with Dr. Mills. Finally, claimant's attorney scheduled a telephone conference call on August 13, 1997, with the Administrative Law Judge and all the parties. INA alleges that it objected to the conference call being used as a preliminary hearing on the basis that there was no statutory notice provided pursuant to K.S.A. 44-534a, as amended, and respondent was not given an opportunity to present evidence on the compensability of the claim or whether claimant was entitled to medical treatment. Claimant, in his brief, does not recall whether respondent objected to the preliminary hearing being held by telephone conference.

The Administrative Law Judge followed the telephone conference with the Order dated August 26, 1997, and the Order Nunc Pro Tunc dated August 29, 1997, that are the subject of this appeal. The Administrative Law Judge found, for preliminary hearing purposes, that INA was liable for the medical treatment provided by Dr. Mills beginning December 12, 1996, and for a \$45 medical bill from Dr. Mills for treatment provided claimant on November 6, 1996.

The Appeals Board has jurisdiction to review "questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge." See K.S.A. 44-555c(a), as amended. No transcript of the proceedings was made in either the preliminary hearing held on December 12, 1996, or the telephone conference held on August 13, 1997.

The Appeals Board finds that the telephone conference held on August 13, 1997, was a continuation of the original preliminary hearing held on December 12, 1996. That conclusion is supported by the Administrative Law Judge's preliminary hearing Order dated December 12, 1996, that indicated "The issue of liability for Dr. Mills' medical treatment is under advisement pending a report from Dr. Mills regarding the causation of Claimant's current symptoms."

INA contends that it objected to the continuation of the preliminary hearing by telephone conference. Since there was no transcript of the proceedings made, the Appeals Board assumes the respondent made this timely objection. The Appeals Board concludes that, unless the parties agree otherwise, a complete record of a preliminary hearing must be made by a certified shorthand reporter appointed by the Director. See K.S.A. 44-552(a). Therefore, the Appeals Board finds the preliminary hearing Order dated August 26, 1997, and the preliminary hearing Order Nunc Pro Tunc dated August 29, 1997, entered by Administrative Law Judge Nelsonna Potts Barnes are reversed and remanded to the Administrative Law Judge. The Administrative Law Judge is ordered to give all parties the necessary statutory notice and to hold a preliminary

hearing before a certified court reporter appointed by the Director to make a complete record of the proceedings as required by K.S.A. 44-552(a).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order, dated August 26, 1997, and the preliminary hearing Order Nunc Pro Tunc, dated August 29, 1997, entered by Administrative Law Judge Nelsonna Potts Barnes, should be, and is hereby, reversed and remanded to the Administrative Law Judge for further proceedings as provided in this Order.

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

c: Steven L. Foulston, Wichita, KS
Vincent A. Burnett, Wichita, KS
Kendall R. Cunningham, Wichita, KS
Garry L. Howard, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director